Filed 1/10/13

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. CARLTON MAYHAM, Defendant and Appellant.	B237074 (Los Angeles County Super. Ct. No. YA080285)

APPEAL from a judgment of the Superior Court of Los Angeles County, James Brandlin, Judge. Affirmed.

Jennifer Hansen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, Pamela C. Hamanaka, Deputy Attorney General, for Plaintiff and Respondent.

* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of **BACKGROUND, DISCUSSION, parts A and C.**

INTRODUCTION

Defendant and appellant Carlton Mayham (defendant) was convicted of corporal injury to the mother of his child (Pen. Code, § 273.5, subd (a)).[1] On appeal, defendant contends that the trial court violated his state and federal constitutional rights to due process, a fair trial, and effective assistance of counsel by excluding him from the courtroom without an "audio or video feed"[2] allowing him to hear a trial witness's testimony. In the published portion of this opinion, we hold that under the circumstances, the trial court did not err by excluding the defendant without an audio or video feed from a portion of the trial. In the unpublished portion of the opinion, we hold that the trial court did not err in other rulings challenged by defendant. We affirm the judgment.

BACKGROUND

A. Factual Background

1. Prosecution Evidence

a. The Events of January 27, 2011

Trial commenced on June 27, 2011. Melvin Ramon Washington, a 911 operator at the South Los Angeles station dispatch center, testified that on January 27, 2011, at approximately 7:00 p.m., he received a telephone call from Christian Cornejo (Cornejo). The audio recording of the 911 telephone call was played for the jury, stating that Cornejo said she was on Imperial and New Hampshire, and defendant, "my son's father, he just busted my head open and I got blood all over my face. And he socked me with my son in my hand."

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[1] All statutory citations are to the Penal Code unless otherwise noted.

[2] The electronic transmission of the audio or visual events at the trial—presumably audio and video, or just audio.

Los Angeles County Sheriff's Department Deputy Salvador Romero testified that at approximately 7:00 p.m., he and his partner arrived at Imperial and New Hampshire in Los Angeles, and he saw Cornejo in front of a liquor store near a pay telephone and her forehead was swollen and bleeding. Cornejo, who was with her child, was crying and distraught. Cornejo told Deputy Romero that she had been living with defendant for two years, and she was arguing with defendant about expenses for their child when defendant became angry and struck her in the face with his fist while she was carrying the child in her arms. Cornejo told Deputy Romero that the assault occurred in the parking lot area of the liquor store.

Fire Department paramedic Jeff Duran testified that at approximately 7:00 p.m., he arrived at the incident scene, saw that Cornejo had a laceration on her forehead and blood on her face, and she was complaining of shoulder pain. Cornejo said she was struck with a fist. Cornejo did not say females struck her with a fist. Cornejo and her child were transported to the hospital.

Dr. Julie Jacob, an emergency medicine physician working at Centinela Hospital, treated Cornejo. Cornejo had a two-centimeter laceration to her forehead requiring three stitches, and complained of neck and back pain. Cornejo said that her boyfriend hit her in the head with a cell phone.

b. The Investigation

Los Angeles County Sheriff's Department Detective Fred Jimenez testified at trial that on February 2, 2011, he contacted Cornejo and reviewed with her "the details and facts" of Deputy Romero's police report. Cornejo confirmed the facts in the report, but stated that she did not want "to pursue the case any longer" because defendant was "not in her life anymore." Cornejo did not tell Detective Jimenez that a female punched her or that anyone other than defendant had hurt her.

Detective Jimenez testified that on February 11, 2011, defendant was detained based on a "want request," and at 1:20 a.m. was "booked" at the South Los Angeles Sheriff's station. At about 9:00 a.m., Cornejo called Detective Jimenez and said that she

had made up the story that she told the deputies, defendant had not assaulted her, and she "was beat up by females."

Detective Jimenez reviewed audio recordings of telephone calls between defendant and Cornejo that occurred when defendant was incarcerated (jail calls), because Detective Jimenez became suspicious of the timing of defendant's arrest and the subsequent telephone call he received from Cornejo during which she recanted her story. An audio recording of a February 11, 2011, jail call that defendant made to Cornejo was played for the jury. The following exchange occurred during that jail call: "[Defendant:] [Tell the detectives that] you know now that I thinkin' about it. Tell the detectives that I ain't seen you since my birthday. I ain't seen you like in a month. . . . We got [in] a fight. On my birthday. You thought I was cheatin' on you. . . . [¶] . . . [¶] [Cornejo:] No, you can't lie to dem. 'Cause dey got to the report. . . . [¶] [Defendant:] Listen here dude. Listen here dude. What is—I'mma tell dis and I'mma tell them. Quit talking to me, all right? I'mma tell you what happen. As far as I know of. Alright? Hello? [¶] [Cornejo:] Yeah. [¶] [Defendant:] Do you hear what I'm sayin'? [¶] [Cornejo:] Yes. [¶] [Defendant:] I haven't seen you since like the sixth of January or whatever you know what I mean. . . . Well I found out like a couple of days ago whatever that you got into a fight with this girl over at my momma house. I guess you was over on your way to see my moms and some girl walked up on you with a couple o' other girls you know what I mean? And they told you that you know, she fuckin' with me and yadda yadda yadda you know what I'm sayin' . . . . And I guess one of the girls hit you or some shit and like you know, you fell out. You know and then you was so mad at me because this girl said she fuckin' with me and you know what I'm sayin' that you know you told them that I did it you know. 'Cause you was so mad. 'Cause of the fact that you thought I was been cheatin' on you and all this. You thought I'd be cheatin' on you and all this. [Pause.] You hear me? [¶] [Cornejo:] Yeah. [¶] [Defendant:] . . . That's what happened—You know what I mean? Is that what happened? [Cornejo:] Yeah. [¶] [Defendant:] Uh huh. Well Detective Jimenez need to know that that's what happened. . . . [¶] . . . [¶] Can I say something? Or no? [¶] [Defendant:] Say

something what? [¶] Like what about those— [¶] [Defendant:] It don't matter. You lied, that's the bottom line. You lied because you was mad. But what really happen' is what I just said. . . . [Y]ou wanted me to get in trouble. . . . But I really didn't do that, but you know what I mean. . . . The one that said she was fuckin' with me and all this other shit. She the one did it. You know? [¶] [Cornejo:] So you not gonna stay in jail, right? [¶] [Defendant:] Nah! I can get out tonight, if you call this dude now! I know you got his number [¶] . . . [¶] [Cornejo:] Well. If you want, you can give them my number. [¶] [Defendant:] No, if you want, you can call up here. Aye-sap. . . . [¶] . . . . [¶] . . . You should be trying to work on get me up out of here. That should be your main goal right now. [¶] . . . . [¶] [Cornejo:] Hey baby boo, when I call . . . whoever he is. Um, like. What do I start sayin? Cause like. First of all, he gon' be like. [Pause] How he gon' be askin' me, like how the fuck did I know you was there? And why am I callin'? You know? Like? [¶] [Defendant:] You seen me get arrested. Or somebody just called you—somebody just called you that seen me get arrested. [¶] [Cornejo:] No. And you don't think that makes him suspicious like and stuff? [¶] . . . [¶] [Defendant:] You tell them I just finished talking to you. It don't matter because they tape record these conversations and they probably lookin' through the whole log anyway. . . . It don't matter how you know—"

c. Cornejo's Testimony

1) Preliminary Hearing Testimony

On June 29, 2011, detective Jimenez, and Kevin Sleeth, the prosecutor's investigator, testified at trial that despite their efforts they were unable to locate Cornejo to testify at trial, and they were unsuccessful in attempting to serve her with a subpoena to testify at trial. The trial court said that Cornejo failed to appear for trial the prior day, June 28, 2011, and a body attachment was issued for Cornejo. The trial court found that Cornejo was unavailable to testify at trial, and a transcript of Cornejo's March 1, 2011, preliminary hearing testimony was read to the jury.

Cornejo testified at the preliminary hearing that on January 27, 2011, at about 7:00 p.m., she was near a liquor store on Imperial and New Hampshire in Los Angeles when she was approached by three women. One of the women confronted Cornejo about defendant, they started to argue, and the woman, who was holding a cellular telephone and had a couple of rings on her fingers, hit Cornejo on the forehead.

Cornejo testified that she called 911, but did not tell the operator about any women. Cornejo told the 911 operator that her husband had hit her, but she lied. After Cornejo called 911, the police arrived and what she told them was a lie. Cornejo was upset with defendant because she knew the woman was "messing around" with defendant. Cornejo had not seen defendant since his birthday on January 6, 2011.

Cornejo testified that about a week after the incident, she spoke to Detective Jimenez by telephone, and she was still angry at defendant. Cornejo did not tell Detective Jimenez anything about women hitting her.

Cornejo testified that defendant called her when he was arrested. According to Cornejo, she did not have a conversation with defendant in which he told her to say the injury was caused by women. Cornejo never told anyone about the women that caused her injuries until after defendant was arrested and she called Detective Jimenez about them.

2) Trial Testimony

The day after the transcript of Cornejo's preliminary hearing testimony was read to the jury, Cornejo appeared for trial and testified as a witness. Cornejo testified that she knew that she had been ordered to appear in court on June 16**,** 2011, and on June 28, 2011, for the trial of this matter, but she did not appear because she was angry and she "didn't want to be bothered with it."

Cornejo testified that she dated defendant from 2008 to the time of trial, except, as she testified on cross-examination, when defendant was "in jail." Prior to the incident, Cornejo and defendant were living together, "on and off." Defendant was Cornejo's boyfriend, but she called him her husband. Less than a year after Cornejo met defendant,

they had a child. Defendant helped Cornejo pay the rent and helped support their son. Defendant and their son were Cornejo's "family," and they are "all I got." Prior to the January 27, 2011, incident, the last time she saw defendant was on January 6, 2011, when they celebrated his birthday.

Cornejo testified that on January 27, 2011, she encountered three women, one of whom said she was "fucking" defendant. Cornejo and the woman fought. The woman hit Cornejo twice, Cornejo fell to the ground, the woman kicked Cornejo, and the three women ran away. Cornejo's forehead was injured, which left a half-inch scar.

Cornejo testified that she lied to the 911 operator. Cornejo did not tell the 911 operator about women hitting her. Cornejo told the 911 operator that defendant hit her, but he had not. Cornejo was mad at defendant and "was thinking about get-back." Cornejo lied to the police when they came to the scene of the incident, saying that defendant had hit her because she had asked defendant for money to pay for their son's expenses. When the paramedics arrived, she lied to them and did not tell them about any women hitting her. When she went to the emergency room immediately following the incident, she did not tell an emergency room doctor that her boyfriend punched her with a cellular telephone in his hand.

The first time Cornejo spoke to defendant after the January 27, 2011, incident was on February 11, 2011, after defendant was arrested and defendant called her on the telephone. She told defendant about the women who beat her up. Defendant did not ask her to call Detective Jimenez. Since February 11, 2011, Cornejo spoke with defendant "a lot"—probably more than 10 times—and sometimes they talked about the case against defendant. Cornejo loved defendant and would "do anything for him."

According to Cornejo, on February 18, 2011, she had a fight with her brother over a television, and she told her brother, "Go ahead, call the police, because I'll tell them you tried to kill me." She added that the police were going to arrest Cornejo because they thought she had fabricated the allegation against her brother, and that prior to the January 27, 2011, incident, she had lied to the police.

d. Expert Testimony

Gail Pincus, the prosecutor's domestic violence expert, testified about the cycle of domestic violence. Victims of domestic violence often recant their stories and protect their abusers. It is also common for the victims to recant their admission of abuse and continue living with and having a relationship with the abuser.

Pincus opined, based on a hypothetical situation in which the abuser hits the victim, the victim calls 911 and reports the abuse, two weeks pass before the abuser is taken into custody and contacts the victim telling her to do something for him, and the victim is accommodating, the situation is consistent with someone who has experienced the domestic violence cycle. If the victim calls 911 and law enforcement becomes involved, and the abuser asks the victim to "fix" the situation, it is common for the victim to follow the abuser's instructions. The victim commonly denies that the abuse occurred, even after admitting the abuse occurred.

2. Defendant's Evidence

Dante Marshon Calvin, defendant's friend for 20 years, testified that from January 6, 2011, through February 10, 2011, defendant lived with Calvin and his wife in Hemet, and during that period, to Calvin's knowledge, defendant did not go to Los Angeles. Defendant did not have a car, and Calvin and his wife had one car. Calvin admitted that he had more than one prior felony conviction, including "several firearms convictions."

Briana Meece testified that the first time she met Cornejo was when Cornejo was looking for witnesses to the January 27, 2011, incident, and she and Cornejo are not friends nor are they related. She lived on New Hampshire Avenue, and near the end of January, 2011, she was standing outside in her neighbor's yard and saw a fight near the liquor store next to her house. Meece saw three to four women "jumping" on and hitting Cornejo. A small child was standing off to the side. Cornejo was knocked to the ground and kicked, and the women ran away. After the women ran away, Cornejo got up, took physical custody of the child, went to a telephone booth, and made a telephone call.

About five or ten minutes later, the police and the paramedics arrived. Meece did not see defendant at the scene of the incident.

B. Procedural Background

The District Attorney of Los Angeles County filed an information charging defendant with corporal injury to a child's parent, Cornejo, in violation of section 273.5, subdivision (a), and child abuse of L.M. in violation of section 273a, subdivision (a). The District Attorney alleged two serious or violent felony convictions as strike priors within the meaning of sections 1170.12, subdivisions (a) through (d), and 667, subdivisions (b) through (i), and three prior convictions as prior prison term convictions within the meaning of section 667.5, subdivision (b). Defendant pleaded not guilty to both crimes, and denied the special allegations in the information.

Following a trial, the jury found defendant guilty of corporal injury to a child's parent, and not guilty of child abuse. On its own motion, the trial court struck one prior strike conviction pursuant to section 1385. Defendant admitted the remaining prior strike conviction allegation and the three prior prison term conviction allegations. The trial court sentenced defendant to state prison for a term of nine years, and awarded defendant 388 days of custody credit consisting of 259 days of actual custody credit and 129 days of conduct credit.

DISCUSSION

A. Denial of Defendant's Motion to Continue Trial

Defendant contends that the trial court violated his Fifth, Sixth, and Fourteenth Amendment rights to due process, a fair trial, and effective assistance of counsel in denying defendant's motion to continue trial to allow defendant's counsel to prepare transcripts of recorded jail telephone calls between defendant and Cornejo. We disagree.

1. Standard of Review

"[T]he decision whether or not to grant a continuance of a matter rests within the sound discretion of the trial court. [Citations.] The party challenging a ruling on a continuance bears the burden of establishing an abuse of discretion, and an order denying a continuance is seldom successfully attacked. [Citation.] [¶] Under this state law standard, discretion is abused only when the court exceeds the bounds of reason, all circumstances being considered. [Citations.] Moreover, the denial of a continuance may be so arbitrary as to deny due process. [Citation.] However, not every denial of a request for more time can be said to violate due process . . . ." (*People v. Beames* (2007) 40 Cal.4th 907, 920-921.)

2. Applicable Law

Section 1050, subdivision (e) provides, "Continuances shall be granted only upon a showing of good cause." In assessing whether the moving party has established good cause to continue the trial, the trial court must consider """"not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion.""" [Citation.]" (*People v. Doolin* (2009) 45 Cal.4th 390, 450.)

"The Sixth Amendment to the federal Constitution, as applied to the states through the due process clause of the Fourteenth Amendment [citation], guarantees a criminal defendant the 'right to a speedy and public trial.' Similarly, article I, section 15 of the California Constitution guarantees an accused the 'right to a speedy public trial.' The California Legislature has 're-expressed and amplified' these fundamental guarantees by various statutory enactments, including Penal Code section 1382. [Citation.]" (*People v. Harrison* (2005) 35 Cal.4th 208, 225.)

Section 1382, subdivision (a) requires dismissal of a felony action if the trial is not commenced within 60 days of the defendant's arraignment, unless the defendant waives

that requirement or good cause is shown.[3] "Section 1382 does not define 'good cause' as that term is used in the provision, but numerous California appellate decisions that have reviewed good-cause determinations under this statute demonstrate that, in general, a number of factors are relevant to a determination of good cause: (1) the nature and strength of the justification for the delay, (2) the duration of the delay, and (3) the prejudice to either the defendant or the prosecution that is likely to result from the delay. [Citations.] Past decisions further establish that in making its good-cause determination, a trial court must consider all of the relevant circumstances of the particular case, 'applying principles of common sense to the totality of circumstances . . . .' [Citations.] The cases recognize that, as a general matter, a trial court 'has broad discretion to determine whether good cause exists to grant a continuance of the trial' [citation], and that, in reviewing a trial court's good-cause determination, an appellate court applies an 'abuse of discretion' standard. [Citations.]" (*People v. Sutton* (2010) 48 Cal.4th 533, 546-547, fn. omitted.)

"Although 'a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality[,] . . . [t]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process.' [Citation.] Instead, '[t]he answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial

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[3] Section 1382 provides in part, "(a) The court, unless good cause to the contrary is shown, shall order the action to be dismissed in the following cases: [¶] . . . [¶] (2) In a felony case, when a defendant is not brought to trial within 60 days of the defendant's arraignment on an indictment . . . . However, an action shall not be dismissed under this paragraph if either of the following circumstances exists: [¶] (A) The defendant enters a general waiver of the 60-day trial requirement. A general waiver of the 60-day trial requirement entitles the superior court to set or continue a trial date without the sanction of dismissal should the case fail to proceed on the date set for trial. . . . If a general time waiver is not expressly entered, subparagraph (B) shall apply. [¶] (B) The defendant requests or consents to the setting of a trial date beyond the 60-day period. In the absence of an express general time waiver from the defendant . . . the court shall set a trial date. Whenever a case is set for trial beyond the 60-day period by request or consent, expressed or implied, of the defendant without a general waiver, the defendant shall be brought to trial on the date set for trial or within 10 days thereafter."

judge at the time the request is denied.' [Citations.]" (*People v. Beames*, *supra*, 40 Cal.4th at p. 921.)

3. Background Facts

On June 16, 2011, Cornejo failed to appear at trial, and the trial court issued a body attachment for Cornejo[4] and scheduled a pretrial hearing for June 17, 2011. During a hearing on June 17, 2011, defendant's counsel requested that the case "trail" because the day before she received audio recordings of jail calls on February 18, to 20, 2011, and she was unsure that she would be able to have them transcribed in time for trial. The trial court stated, "Why don't you [i.e., defendant's counsel] listen [to the audio recordings] first. It may be something that doesn't need a transcript. . . . Listen to it first." Defendant's counsel stated that defendant was not willing to waive time to allow the audio recordings to be transcribed. The prosecutor and defendant's counsel conferred and agreed to start trial on June 27, 2011.

On June 22, 2011, defendant filed a motion to continue the trial on the basis that on June 16, 2011, defendant's counsel received audio recordings of jail calls that were approximately four and one-half hours long; she was unable to open the recordings until June 20, 2011; she was "informed and believe[d] that these jail house calls [were] necessary to possibly impeach and to counter the prosecution's domestic violence expert;" she secured two law clerks to aid the defense in transcribing the necessary portions of the conversations; and she believed that the audio recordings could be transcribed by July 8, 2011.

At the June 23, 2011, readiness conference, "day seven of ten," the trial court heard defendant's motion to continue the trial. Defendant's counsel said that she listened to the audio recordings, she had to "keep repeating it just to understand what's really going on," and there was some material on them "which I think would be necessary for

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[4] The prosecutor's investigator located Cornejo and brought her to the courthouse for a hearing on June 23, 2001. The trial court recalled the body attachment because Cornejo agreed to appear on June 28, 2011.

presentation of the defense." According to defendant's counsel, that information included statements that Cornejo made to her brother that "I will tell the police you hit me. I'll have you arrested. I'll fuck you up. You don't know who you're dealing with." Defendant's counsel contended these statements give the "impression . . . that she is willing to fabricate to the police and have him incarcerated." According to defendant's counsel, the audio recordings also included a conversation about the police telling Cornejo that "if we find that you lied to us, we'll arrest you," and Cornejo telling defendant "I almost got arrested last night." Defendant's counsel contended these statements imply that Cornejo had fabricated the battery allegations.

The following exchange occurred at the June 23, 2011, hearing: "[Defendant's counsel:] The normal remedy would be to permit counsel to have a sufficient amount of time. The issue here, unfortunately, though is that [defendant] doe[s] not want to waive time. I am just making my record to say I am asking the court to continue the case over his objection to that date [July 8, 2011] so I have a sufficient amount of time to do the transcription. [¶] We are moving as quickly as we can. . . . [¶] [Trial court:] I don't know if preparation of transcripts is good cause for a continuance. I would certainly agree to one if your client was willing to waive time. But since he's not willing to waive time, I don't think you've demonstrated good cause. You said you've listened to the tapes. The court rules require[] that a transcript be made at some point prior to the end of the trial. So absent your client's agreement, I don't think it's been demonstrated that there is good cause to continue the case over your client's objection. [¶] [Defendant's counsel:] Just so the record is very clear, I think that these transcripts would be used to aid the jury in properly being able to assess the credibility of [Cornejo]. [¶] [Trial court:] They can actually listen to the recordings. [¶] Defendant's counsel:] And I understand that, Your Honor. [¶] Just so the court is aware, the sound quality of these is very bad. So I think a transcript is really required to understand the nature of what is being said. [¶] . . . [¶] [Trial court:] I hear you. If your client was in agreement I would grant the motion for a continuance, but he's not in agreement and I don't think you've demonstrated good cause. It appears to me you are still able to effectively represent him.

You can convey to the jury what is said on the recordings just as [the prosecutor] can. [¶] [Prosecutor:] Your Honor . . . some of these recordings, as counsel stated, it's close to impossible to discern what is being said because there are multiple voices overlapped. [¶] [A] transcript may even be at issue in this particular instance because there's so many different voices and there's so many different ways that one could interpret what one is hearing. And my interpretation of what I heard is very different than from what [defendant's counsel] just stated. [¶] [Trial court:] I think a transcript could very well be helpful, but I just don't think it rises to the level of good cause absent the defendant's agreement." The trial court inquired of defendant, and defendant advised that he was "not willing to waive time to let [defendant's counsel] fully represent" him.

On June 24, 2011, the case was transferred to a courtroom for trial. At the June 27, 2011, hearing, defendant's counsel renewed her motion to continue the trial on the basis that she had insufficient time to transcribe the recordings, but stated that defendant "was unwilling to waive time for us to have them transcribed." Defendant's counsel said she was "informed and believe[d]" that there is information on the audio recordings that "would help bolster our argument that the testimony that [Cornejo] gave a the prelim was in fact the accurate information. [¶] There is also information we believe in those tapes to bolster the fact she does not fall under the purview of a battered woman." The trial court said to defendant's counsel, "I think you have a huge [Evidence Code section] 352 issue. I really do. So I'm disinclined to permit it unless there's some obvious indication that the witness is fabricating, or willing to fabricate, to lie, to better her own self-interest." The trial court stated that whoever was offering into evidence at trial portions of the audio recordings of the jail calls must provide a transcript of the portion played to the jury.

On June 28, 2011, Cornejo again failed to appear for trial as ordered by the trial court. On June 29, 2011, Cornejo's preliminary hearing testimony was read into the record during defendant's trial.

On June 30, 2011, Cornejo appeared before the trial court to testify. Defendant's counsel stated that she had ceased transcribing the audio recordings of the jail calls when

Cornejo failed to appear on June 28, 2011, and her preliminary hearing testimony was read into the record during defendant's trial. According to defendant's counsel, she needed to have the audio recordings transcribed to impeach Cornejo. The trial court responded, "Well, if necessary, my inclination is to permit you to play the audio recordings, but require at some point in time the audio recordings be transcribed before the case goes to the jury. . . . [¶] . . . [¶] [M]y findings are that [Cornejo] is colluding with the defendant for the purposes of making herself unavailable. [¶] This is an issue that the defendant has orchestrated. And I'm not going to continue the trial . . . , and I'm not going to be manipulated."

Defendant's counsel stated, "Your Honor, I understand the court's finding. Just so the record is clear—I feel that . . . defendant has a right to . . . have his attorney prepared so I can at least impeach [Cornejo]. . . . [¶] . . . [¶] I feel sandbagged." The trial court responded, "By your client. You're sandbagged by your client, because your client is manipulating the proceedings, and has done it from the minute he was taken into custody in the sheriff's jail. He's calling the shots. [¶] So he can't really complain about it if he gets convicted, if he's not cooperating with you, and he's playing games."

As discussed *post*, on June 30, 2011, the trial court removed defendant from the courtroom during Cornejo's trial testimony pursuant to section 1043 because he was disruptive. Thereafter, the prosecutor stated that defendant's counsel had listened to the audio recordings in their entirety, and the content of the "jail calls" do not directly impeach Cornejo because she did not admit to any wrongdoing or lying about what occurred. Defendant's counsel responded that "we don't know what's relevant or not relevant on the tapes" because we "need a transcript to see what [was] said. [¶] . . . [¶] And this is where the problem lies. I don't know if she's going to—if she admits to it, there's not a problem."

The trial court stated, "Let's finish with the witness [i.e., Cornejo]. Let's determine whether or not you actually need a continuance, depending on whether or not [Cornejo] admits to certain statements that you believe that are on the audio tape. [¶] If [Cornejo] . . . does acknowledge them, then a continuance is unnecessary. [¶] If

[Cornejo] does not admit them, then the court will permit you to play portions of it, and follow up with written transcripts at a later time, if it's necessary. [¶] . . . [¶] I'll absolutely give you the opportunity to meet and confer with [defendant] as regularly as you need to."

On the day defendant was excluded from the courtroom, Cornejo completed her testimony. Cornejo testified, inter alia, that around February 18, 2011, she had a fight with her brother over a television and told her brother to call the police because she would tell them he attempted to kill her; she told defendant that her grandmother called the police on her and she was afraid the police would arrest her for making false allegations of battery against her brother; and she previously made false allegations against someone to the police. Neither defendant nor his counsel requested a continuance based upon Cornejo's testimony, and defendant did not introduce any portions of the audio recordings of the jail calls.

4. Analysis

a. Waiver

Defendant relinquished his contention that the trial court erred in denying his request for a continuance of the trial in order to transcribe the audio recordings of the jail calls. A waiver is '"an intentional relinquishment or abandonment of a *known* right . . . ."' (*People v. Hester* (2000) 22 Cal.4th 290, 299.) "Under the doctrine of waiver, a party loses the right to appeal an issue caused by affirmative conduct or by failing to take the proper steps at trial to avoid or correct the error. [Citation.]" (*Telles Transport, Inc. v. Workers' Comp. Appeals Bd.* (2001) 92 Cal.App.4th 1159, 1167.)

Defendant's counsel said the audio recordings contained material necessary for the presentation of a defense, including Cornejo's statements made to defendant that she told her brother that she was going to call the police and tell them he hit her. She was almost arrested for making false allegations against someone. Defendant's counsel subsequently told the trial court that "there is not a problem" if Cornejo admits to certain matters on the

audio records. The trial court stated, "Let's finish with this witness [i.e., Cornejo]" and we can then determine whether or not you actually need a continuance, depending on whether or not [Cornejo] admits to certain statements that you believe that are on the audio tape. [¶] If [Cornejo] . . . does acknowledge them, then a continuance is unnecessary."

On cross-examination, defendant was able to elicit from Cornejo the necessary information from the audio recordings because Cornejo admitted to the matters that concerned defendant's counsel. Specifically, Cornejo admitted that she had a fight with her brother and told her brother to call the police because she would tell them he attempted to kill her; that she was almost arrested for making false allegations of battery against her brother; and that she previously made false allegations to the police against someone.

Defendant did not thereafter assert in the trial court that he still required a continuance of the trial. If there was still "a problem" requiring a continuance to transcribe the audio recordings, defendant's counsel could have raised the issue. She did not, and therefore waived any claim of error on this basis.

Defendant contends that despite the specific admissions made by Cornejo, there "[n]evertheless . . . may have been other even more damaging material" on the audio recordings of the jail calls that was not introduced into evidence by defendant. Defendant does not specify what "other even more damaging material" was on the audio recordings. His contention, therefore, is speculation and does not establish that defendant was prejudiced by the trial court's denial of his counsel's request to continue the trial to allow defendant's counsel to have the audio recordings transcribed.

b. Abuse of Discretion

Even if defendant did not relinquish his contention, the trial court did not abuse its discretion in denying his request to continue the trial. Defendant refused to waive his right to a speedy trial, and defendant's counsel was not deprived of a reasonable opportunity to prepare her defense by the trial court denying defendant's request to

continue the trial to allow her to transcribe the audio recordings. The prosecutor stated that the audio recordings were difficult to understand. In addition, the trial court said it would allow defendant's counsel to consult with defendant "as regularly as [she] need to," and defendant's counsel had listened to the audio recordings. The trial court told defendant's counsel that she can play excerpts from the audio recordings for the jury, and instead of presenting to the jury transcripts of the audio recordings at the time the excerpts are played, she "can convey to the jury what is said on the recordings just as [the prosecutor] can." The lack of transcripts of the audio recordings did not prevent defendant's counsel from eliciting testimony from Cornejo about the jail calls or the subject matters discussed during them. Moreover, if defendant's counsel wanted to use at trial portions of the audio recordings, she could have had those limited portions of the audio recordings transcribed, thereby greatly expediting the transcription process.

On numerous occasions, Cornejo failed to appear before the trial court, and the trial court found that Cornejo "is colluding with the defendant for the purposes of making herself unavailable. [¶] This is an issue that the defendant has orchestrated." Defendant does not challenge these findings, and if the trial court continued the trial, it would be taking a substantial risk that Cornejo would return to the courtroom on the continued date to resume her testimony.

c. Prejudice

Even if the trial court erred in denying defendant counsel's request for a continuance, defendant did not establish that he suffered any prejudice by the trial court's ruling. "Absent a showing of . . . prejudice, the trial court's denial [of a motion to continue trial] does not warrant reversal. [Citation.]" (*People v. Doolin, supra,* 45 Cal.4th at p. 450.)

As noted *ante*, defendant's counsel had listened to the audio recordings. The lack of transcripts of the audio recordings did not prevent defendant's counsel from eliciting testimony from Cornejo about the jail calls or the subject matters discussed during them.

Defendant contends that he was prejudiced by the denial of his request for as continuance because there "may have been . . . damaging material" on the audio recordings of the jail calls that was not introduced into evidence by defendant. Defendant, however, does not specify what "damaging material" was on the audio recordings or state how he was prejudiced by not having transcripts of those statements.

B. Defendant's Removal From The Courtroom Without An Audio Or Video Feed

Defendant contends that the trial court violated his state and federal constitutional rights to a fair trial, due process, and effective assistance of counsel by not providing him with an audio or video feed to hear or observe the victim's testimony after the trial court excluded defendant from the courtroom. We disagree.

Defendant was charged with striking Christian Cornejo (Cornejo), his former girlfriend and mother of his child. She reported this incident, but later recanted. Cornejo testified at the preliminary hearing that she was struck by others and had previously lied when she reported she was hit by defendant. Cornejo initially failed to appear at trial and could not be found to be served with a subpoena. After her preliminary hearing testimony was read to the jury, she appeared for the trial and testified as a witness. She reiterated that people other than defendant had assaulted her and that she had lied on prior occasions. Cornejo's telephone calls with defendant discussing the case had been recorded, and the prosecutor introduced into evidence a portion of the recording. Because the recordings of those jail conversations were provided to defense counsel shortly before trial, defendant sought a continuance of the trial so that the recordings could be transcribed. The trial court denied the continuance, and in the unpublished portion of this opinion, we determined that the denial did not constitute prejudicial error.

1. Standards of Review

"An appellate court applies the independent or de novo standard of review to a trial court's exclusion of a criminal defendant from trial, either in whole or in part,

insofar as the trial court's decision entails a measurement of the facts against the law." (*People v. Waidla* (2000) 22 Cal.4th 690, 741). "We review a ruling on a mistrial motion for an abuse of discretion" (*People v. Lewis* (2008) 43 Cal.4th 415, 501), and we independently review orders denying a motion for new trial to determine if prejudicial trial error occurred (*People v. Ault* (2004) 33 Cal.4th 1250, 1261).

2. Applicable Law

"A criminal defendant, broadly stated, has a right to be personally present at trial under various provisions of law, including the confrontation clause of the Sixth Amendment to the United States Constitution, as applied to the states through the due process clause of the Fourteenth Amendment; the due process clause of the Fourteenth Amendment itself; section 15 of article I of the California Constitution; and sections 977 and 1043 of the Penal Code." (*People v. Waidla*, *supra*, 22 Cal.4th at p. 741.) But, a defendant may be removed from the courtroom during trial in "[a]ny case in which the defendant, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that the trial cannot be carried on with him in the courtroom." (§ 1043, subd. (b)(1); see *Illinois v. Allen* (1970) 397 U.S. 337, 343; *People v. Welch* (1999) 20 Cal.4th 701, 774.)

3. Background Facts

When Cornejo was called to testify at trial, defendant said in open court, "They arresting my wife because she won't lie against me." The trial court told defendant, "Sir, you need to let your lawyer do your talking for you." Defendant replied, "I want the jurors to know what you all doing." The trial court then directed the jurors to go to the jury deliberation room, and the trial court admonished defendant not to speak out loud during the course of the proceedings unless he was testifying. The following exchange then occurred: [Defendant:] "You all trying to f--k me over. There's nothing else to it. [¶] [Trial court:] Your day is here today in court. This is your trial, sir. [¶]

[Defendant:] I have the right to speak. [¶] [Trial court:] Speaking out in front of the jury is not going to help your cause. [¶] [Defendant:] Nothing going to help me because y'all going to f--k me." The trial court ordered defendant to be removed from the courtroom. Defendant stated, "I love you, Christian," and Cornejo replied, "I love you. Calm down, man."

The trial court granted defense counsel's request for time to calm defendant. After a recess, the trial court allowed defendant back in the courtroom, received assurances from defendant and his counsel that defendant would act appropriately and would not engage in any further outbursts, and instructed the jury to disregard defendant's outburst. Cornejo's then resumed testifying.

Shortly thereafter, during a sidebar conference between counsel and the trial court, the court clerk told the trial court that defendant was talking to Cornejo, who was on the witness stand. The trial court directed the jurors to leave the courtroom and ordered defendant removed from the courtroom "based upon statements of misconduct by the deputy [sheriff] and the [court] clerk."

The bailiff, a sheriff's deputy, advised the trial court that defendant started to talk to Cornejo; he told defendant to stop talking; and Cornejo attempted to calm defendant. Defendant then commented to Cornejo about actor Mel Gibson and "other movie stars' sentences. How they were treated in trial." The bailiff told defendant to stop talking and put his hand on defendant's shoulder. The bailiff felt defendant starting to "tense up," so the bailiff handcuffed defendant because the bailiff was concerned defendant "was going to stand up or do something other than just be verbal with the witness."

A sergeant who was in the courtroom told the trial court that defendant looked at the jury and said, "They're trying to f--k me." A law clerk who was in the courtroom said that defendant told the jury, "They're trying to put me away for 17 years." A law clerk heard defendant say something to the effect of, "Stay hostile, baby," to which Cornejo responded, "I know what they're trying to do." The trial court made findings, pursuant to section 1043, subdivision (b)(1) that defendant was continually disruptive, had directly ignored the trial court's warnings, would continue to be disruptive, and there

was no less drastic alternative to having the defendant removed. The trial court stated, "The court orders [defendant's] removal, at least for this afternoon, at this point."

The jurors were brought back into the courtroom, and the trial court instructed the jury to disregard defendant's outburst. Defendant's counsel stated that because she was not able to transcribe the audio recordings of defendant's jail calls, she needed to rely on defendant to "do a proper presentation of the defense in this matter, and to properly cross-examine . . . Cornejo." Defendant's counsel stated that because defendant had been excluded from the courtroom, "the court is going to have to do either audio, or I would ask for video . . . ."

The trial court stated that audio or video was not available, but added, "I'll absolutely give you the opportunity to meet and confer with him as regularly as you need to." Defendant's counsel stated, "I believe that the defendant has a right to at least listen or hear the proceedings and the testimony against him. [¶] And so I think that the court is required to, at the minimum, have the proceedings piped in . . . ." Defendant's counsel also stated, "I would just only ask that the court permit audio or video for [defendant]. . . . I understand [section] 1043 says if they're disruptive, they can be precluded from the courtroom." Defendant's counsel argued defendant had a due process right to "help [her] . . . present a defense." The trial court stated, "If I had the ability to pipe it in, I would. I don't. I don't have the ability to do it. This building was built in the 1960's. We don't have external jacks that you can just plug a speaker into a wall. [¶] It's my understanding that we don't have the facilities available. I did call, and I left a message with . . . one of our managers down in our facilities division. [¶] . . . [¶] I just spoke to . . . our director of facilities. She's indicated that we do not have the resources to be able to do that. [¶] She did offer to contact the internal services to determine whether they have the facilities to be able to do it. [¶] However, their facilities are not available today, and they're closed tomorrow, and Monday is a holiday. So probably the earliest would be Tuesday, if they can do it. And I don't know that they can. But if they could, it would be Tuesday." Cornejo's resumed her testimony that day without defendant being

present in the courtroom. Cornejo was ordered to remain "on call" to testify at the request of either defendant or the prosecution.

The next day, defendant was allowed back in the courtroom and moved for a mistrial because, inter alia, he had not been permitted to hear Cornejo's testimony. Defendant's counsel stated, "I'm not arguing that [defendant] shouldn't have been excluded from the courtroom. That's not my argument. [¶] My argument is that he needed to be present for the testimony, whether it be audio or visual, in some type of manner in which he could have listened to the trial." The trial court denied defendant's motion for mistrial, stating that Cornejo was still on call and that defendant could have her come back and testify further.

At the conclusion of the trial testimony, defendant filed a motion for new trial contending that although there was no statute, "Los Angeles County Court Rule[,] or Los Angeles Court directive regarding audio/video feeds being used when a defendant is removed from the courtroom . . . ," the trial court's denial of his request for an audio or video feed violated defendant's due process rights and his rights under the Sixth Amendment to the United States Constitution.[5] Defendant's motion for new trial was also based on the trial court's denial of defendant's request for a one-day continuance so defendant's counsel and the trial court could "try to obtain the audio equipment."

The following exchange occurred at the hearing on defendant's motion for new trial: "[Defendant's counsel:] The issue here really, Your Honor, is not whether the court could exclude [defendant]. [Section] 1043 basically indicates that [the] court does have a power to do that . . . . [¶] . . . [¶] The question becomes once defendant is excluded, does the court—is there any additional requirement that the court has to do under due process and fundamental fairness to make sure that the defendant at least gets to hear or be able to communicate with his attorney, and to be able to at least tell his attorney or advise as to the testimony that's being presented. [¶] I think the key here,

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[5] The Sixth Amendment provides in part, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . and to have the assistance of counsel for his defense."

Your Honor, is whether or not the court had to pipe in either an audio or video of the proceedings. [¶] Now, there is no actual statute or court rule that actually applies to that. [¶] . . . [¶] Basically, we're saying if you can pipe it in, pipe it in. And I think the question here is we didn't have the equipment here present in the courthouse. [¶] However, defense counsel asked for just a short continuance just for the afternoon session so we could acquire that equipment. [¶] . . . I believe we got the equipment, or was available the next day. [¶] [Trial court:] It was installed the next day. But at the time that the court had made the request for the audio equipment, we did not have an ETA as to when it could have been provided. [¶] We were told that it's not available within our building. A call went to I think County ISD, which is internal services department, to find out whether or not an electrician or sound man is going to be able to come out and install that. [¶] [Defendant's counsel:] And I was also going to call our tech people to see if there was some type of equipment that we could provide to do that. [¶] [Trial court:] Sure. [¶] [Defendant's counsel:] Defense had asked for a short continuance just to the next morning so we could try to acquire that information, or get that equipment. And the court decided to proceed with the trial. [¶] . . . [¶] Because we were placed at such a disadvantage, I think that fundamental fairness and due process requires . . . a new trial. [¶] . . . [¶] We made the objection, and it was a continuous objection. We had asked the court to get us the equipment or to allow us to try and get the equipment. [¶] I had actually called our tech people at the public defender's office to see if we had the ability to get that equipment here. [¶] And I think we . . . just asked for a short continuance. Just to the— [¶] [Trial court:] Well, wait a minute. [¶] What did your tech people tell you? [¶] [Defendant's counsel:] Our tech people said that they have done it downtown, and that they were going to call around to see if he could get the equipment. [¶] [Trial court:] And what information did you relay to the court about your ability to get an alternative equipment set up in a short period of time? [¶] [Defendant's counsel:] Well, I had done it—I wasn't able, obviously, to make that call until after we had recessed for the afternoon and the witness [was] already on the stand. [¶] But at the time I got back here in court, the situation was corrected, and that the court

had learned we were able to get the equipment. [¶] And the defendant stated that he could comport his behavior. So it wasn't necessary. I had just called them, and a late-night call when I got back to my office. [¶] [Trial court:] Okay. What about other alternative equipment that may have been at your disposal? Tape recorder? Did you ask to bring in a tape recorder to tape-record the testimony of the witness? [¶] [Defendant's counsel:] I did not, Your Honor. [¶] [Trial court:] How about a request for a transcript from the court reporter of the testimony of the witness to be able to go over it with the defendant? [¶] Those would have been other options that could have been made available. [¶] [Defendant's counsel:] That's true. [¶] [Trial court:] Look, I think here's the bottom line. I don't think that . . . any of the . . . cases requires that the court have an audio hookup. [¶] I understand that your argument is that as a matter of due process, defendant has a right to understand what the allegations are against him. [¶] But I think that there are also certain practical limitations that are involved. Clearly, the defendant needed to be removed from the courthouse. [¶] . . . I did give the defendant the opportunity to be able to return to the courtroom; not once, twice. [¶] Shortly after the first time where he promised that he would be good, he came back and he was even more disruptive and more disrespectful, and candidly, more corrupt to the judicial process. [¶] But here's the practical issue. You're sitting in a building that was built in 1966, I believe. First opened in 1969. We don't have the luxury of speakers in our lockup. We don't have video feeds. [¶] . . . [¶] You also haven't addressed the issue as to whether or not the defendant was, in essence, prejudiced by it. You've made this broad statement to the effect that because he wasn't here to watch the witness and . . . get these nuances that presumably would go over your head or you wouldn't see, that he was prejudiced by it. [¶] This same witness also testified at the preliminary hearing. Her trial testimony was not that much different than the preliminary hearing testimony in which she testified that it wasn't the defendant that struck her, it was also this woman who struck her with a cell phone in her hand causing the injury to her head. [¶] So I'm not sure how much different that actual testimony would be between the prelim and the trial and how the defendant's presence would have actually been able to help you. [¶] But I would also

note for the record that this same witness is somebody that had to have two body attachments issued for her; who physically had the investigating officers go out to her—I think it was her place of business, or maybe it was the school that she was at, and drag her in here. [¶] So in essence, you're saying that I should have delayed the case another day. And the problem is that I may have lost the only opportunity for that witness to be presented to this jury, because she had a bad track record of coming back to court."

In denying defendant's motion for new trial, the trial court stated, "I don't find that the law mandates a separate sound system to an excluded defendant. I certainly attempted to assist the defense. I even indicated in the transcript that you'd be able to break as frequently as you need to in order to be able to discuss the examination with the defendant. [¶] You asked for a recess to try to calm him down. I granted all of those requests. [¶] I gave him every opportunity to be able to come out here and participate. Unfortunately for him, whether he was incapable [of] controlling himself or he chose not to control himself, it didn't work out for him. [¶] . . . [¶] [D]efendant was excluded due to disruptive behavior. The court admonished the jury not to permit the defendant's absence in the case to influence them. [¶] . . . [¶] I don't think defendant can reasonably insist that the system reacts immediately to accommodate him in this matter, because we don't have the ability to immediately respond to that. [¶] I think we took appropriate steps to try and get a sound system installed for him. But I don't think that the court is required to delay the case indefinitely until that sound system actually occurs. [¶] . . . [¶] The motion for new trial is respectfully denied."

4. Analysis

a. Forfeiture

The Attorney General contends that defendant forfeited his claims that his state and federal constitutional rights to a fair trial and effective assistance of counsel have been violated because defendant did not object in the trial court on those grounds. We disagree.

A party may not raise an argument on appeal that he or she did not raise before the trial court. (*People v. Clark* (1993) 5 Cal.4th 950, 988, fn. 13, disapproved on other grounds as stated in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22.) Defendant here raised his constitutional claims before the trial court. Defendant objected in the trial court that pursuant to his right to a fair trial, he needed to hear Cornejo's testimony and be able to consult with his attorney about the testimony that was being presented. Defendant's counsel stated that because she was not able to transcribe the audio recordings of defendant's jail calls, she needed to rely on defendant to "do a proper presentation of the defense in this matter, and to properly cross-examine . . . Cornejo." She asserted that defendant was necessary to "help" her "present a defense," and defendant had a due process right to be able to hear and advise his attorney about the testimony that is being presented. Defendant contended that the trial court's denial of his request for an audio or video "feed" violated defendant's rights under the Sixth Amendment–which includes the right to assistance of counsel. Defendant preserved his claim of a violation of his constitutional rights.

b. **No Error**

The trial court did not err by excluding defendant from the courtroom without an audio or video feed to hear or observe Cornejo's testimony. Defendant does not challenge the order excluding him from the courtroom; he challenges the trial court's failure to provide him with an audio or video feed in his absence from the trial.

As defendant concedes, there is no actual statute or court rule that requires a trial court to provide a defendant with an audio or video feed of the trial testimony when a defendant is removed from the courtroom. He relies, however, on Justice Brennan's concurring opinion in *Illinois v. Allen, supra,* 397 U.S. at page 351, stating that "Once the court has removed the contumacious defendant, it is not weakness to mitigate the disadvantages of his expulsion as far as technologically possible in the circumstances." Justice Brennan did not state there was a requirement that the trial court mitigate the disadvantages by any and all technological means. He merely suggested the use of

technology that was "possible in the circumstances." Justice Brennan also stated in this connection that "when a defendant is excluded from his trial, the court should make reasonable efforts to enable him to communicate with his attorney and, *if possible*, to keep apprised of the progress of his trial." (*Ibid.*, italics added.)

Other jurisdictions have determined that a defendant is not constitutionally entitled to an audio or video feed of the trial testimony when he or she has been excluded from the courtroom during trial. The court in *Bell v. Evatt* (4th Cir. 1995) 72 F.3d 421 stated, "We have never held . . . that a defendant who has been removed from the courtroom because of his disruptive behavior has a right to an audio hook-up. We see no reason to create such a right." (*Id.* at p. 432; see *Jones v. Poole* (S.D.N.Y. Aug. 9, 2005, No. 04 Civ. 0303) 2005 U.S. Dist. Lexis 46297, *26-*27; *United States v. Solomon* (S.D.N.Y. May 8, 1997, No. 95 Cr. 154) 1997 U.S. Dist. Lexis 6246, *21.)

There were practical limitations on complying with defendant's request to have an audio or video feed of the trial testimony when, during Cornejo's testimony, he was excluded from the courtroom for less than one day. Upon defendant being removed from the courtroom, the trial court stated that it did not have the ability to "pipe in" the audio of the trial for defendant and that after attempting to confer with the trial court's "internal services," the trial court would not know until the following Tuesday whether it was possible to provide defendant with the requested audio feed. There was a risk that if the trial court continued the trial Cornejo would not complete her testimony. On a number of occasions, she failed to appear, body attachments against her had been issued, and the prosecutor's investigator was required to locate her and physically bring her to the court.

In addition, although defendant contends that he may have been able to arrange to have audio equipment installed for him within a short period of time, his counsel did not advise the trial court of this because counsel's "tech people" had not determined whether it was possible until after defendant had been allowed back into the courtroom and the issue of an audio feed to defendant of the trial testimony was moot.

Also, defendant's counsel did not seek permission to tape record the testimony of the witness or request a transcript from the court reporter of Cornejo's testimony to

enable defense counsel to review the testimony with defendant. The trial court advised defendant's counsel, "I'll absolutely give you the opportunity to meet and confer with him as regularly as you need to." Defendant's counsel could have spoken to defendant before the conclusion of Cornejo's testimony, and because Cornejo was placed "on call" upon the conclusion of Cornejo's testimony, defendant's counsel could have conferred with defendant and could have had Cornejo testify further.

c. Prejudice

The exclusion of defendant for a portion of the trial without an audio or video feed did not prejudice defendant. Defendant concedes that the denial of a defendant's constitutional right to be present at a critical stage of his criminal proceedings is generally subject to harmless error analysis. (*People v. Disandro* (2010) 186 Cal.App.4th 593, 605, fn. 8.) As the trial court observed, defendant was not prejudiced by the trial court excluding him from the courtroom without an audio or video feed because Cornejo's trial testimony was substantially the same as she had previously given during the preliminary hearing. As a result, Cornejo's trial testimony should not have come as a surprise to defendant's counsel, and an appropriate cross-examination of Cornejo could have been conducted without defendant having an audio or video feed of the trial testimony.

Defendant contends on appeal that he was prejudiced because defendant's cross-examination of Cornejo was "more damaging to [defendant] than her testimony in the preliminary hearing." He argues that because he was denied access to the audio of Cornejo's testimony, his counsel's cross-examination of Cornejo "inadvertently elicited that [defendant] was previously in custody by asking why the pair broke up, when they had not in fact broken up, . . . [and] were merely separated because [defendant] went to jail." There is nothing in the record to suggest that had defendant been provided with an audio or video feed of Cornejo's testimony, he would have told his counsel not to ask Cornejo why she and defendant had "broken up." There is no indication that defendant's counsel was unable to confer with him prior to cross-examining Cornejo about the

subject matter. The trial court's removal of defendant from a portion of the trial without audio or video access to the proceedings did not constitute prejudicial error.

C. Equal Protection Challenge to the October 2011 Amendment to Section 4019

Defendant contends, based upon principles of equal protection of the law, that he is entitled to an additional 129 days conduct credit (enhanced one-for-one conduct credits) under the amendment to section 4019 applicable to crimes committed on or after October 1, 2011, even though he committed his offense of corporal injury to a child's parent before October 1, 2011. We conclude that equal protection principles do not require retroactive application of the October 1, 2011, amendment to section 4019.

Defendant committed his offense on January 27, 2011. The version of section 4019 in effect at the time defendant committed his offense provided that he accrued conduct credits at the rate of two days for every four days of actual time served in presentence custody. (Stats. 2010, ch. 426, § 2.) Defendant was sentenced to state prison for a term of nine years, and was awarded 388 days of custody credit consisting of 259 days of actual custody credit and 129 days of conduct credit.

Effective October 1, 2011, section 4019 was amended to provide one-for-one presentence conduct credits for crimes committed on or after October 1, 2011. (Stats 2011, ch. 15, § 482.) Section 4019, subdivision (h) states in pertinent part: "The changes to this section enacted by the act that added this subdivision shall apply prospectively and shall apply to prisoners who are confined to county jail . . . for a crime committed on or after October 1, 2011. Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law."

In *People v. Brown* (2012) 54 Cal.4th 314, our Supreme Court rejected an argument that "apply[ing] former section 4019 prospectively violates the equal protection clauses of the state and federal Constitutions. (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7, subd. (a).)" (*People v. Brown*, *supra*, 54 Cal.4th at p. 328.) The court explained: "The concept of equal protection recognizes that persons who are similarly

situated with respect to a law's legitimate purposes must be treated equally. [Citation.] Accordingly, '"[t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner."' [Citation.] 'This initial inquiry is not whether persons are similarly situated for all purposes, but "whether they are similarly situated for purposes of the law challenged."' [Citation.]" (*Ibid.*) The court then explained that a statute authorizing incentives for good behavior has "important correctional purposes," i.e., promoting good behavior, which "are not served by rewarding prisoners who served time before the incentives took effect and thus could not have modified their behavior in response. That prisoners who served time before and after former section 4019 took effect are not similarly situated necessarily follows." (*Ibid.*, citing with approval *In re Strick* (1983) 148 Cal.App.3d 906, 913 ["incentive purpose has no meaning if an inmate is unaware of it"]; see also *In re Stinnette* (1979) 94 Cal.App.3d 800, 806 ["it is impossible to influence behavior after it has occurred"].)

As in this case, the defendant in *People v. Brown, supra,* 54 Cal.4th 314 relied on *In re Kapperman* (1974) 11 Cal.3d 542 (*Kapperman*), a case holding "that equal protection required the retroactive application of an expressly prospective statute granting credit to felons for time served in local custody before sentencing and commitment to state prison." (*People v. Brown, supra,* 54 Cal.4th at p. 330.) The court rejected the contention that the question of retroactive application of former section 4019 was controlled by *Kapperman*, explaining: "Credit for time served is given without regard to behavior, and thus does not entail the paradoxical consequences of applying retroactively a statute intended to create incentives for good behavior. *Kapperman* does not hold or suggest that prisoners serving time before and after the effective date of a statute authorizing *conduct* credits are similarly situated." (*People v. Brown, supra,* 54 Cal.4th at p. 330; see *People v. Lara* (2012) 54 Cal.4th 896, 906, fn. 9 [declining to find equal protection violation with prospective application of October 1, 2011 amendment]; *People v. Ellis* (2012) 207 Cal.App.4th 1546, at page 1548 [holding that "the amendment to

Penal Code section 4019 that became operative October 1, 2011 . . . applies only to eligible prisoners whose crimes were committed on or after that date"].)

Accordingly, we conclude that defendant is not entitled to the additional accrual of conduct credits under the October 1, 2011, amendment to section 4019.

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

MOSK, J.

We concur:

ARMSTRONG, Acting P. J.

KRIEGLER, J.